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No. 04-

IN THE

Supreme Court of the United States

ST. ANNE COMMUNITY UNIT HIGH SCHOOL DISTRICT No. 302,

Petitioner,

v.

CASEY K., by NORMAN and MARI K.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Individuals With Disabilities Education Act contains a "stay put" provision which requires that disabled children remain in their "then-current educational placement" pending the resolution of disputes regarding special education programming. The "stay put" provision further provides that when a dispute arises regarding a child's initial admission to a public school, "the child shall, with consent of the parents, be placed in the public school program until all such proceedings have been completed." The question presented is:

What constitutes the "then-current educational placement" for a disabled child transferring into a new public school system when the student's parents challenge the new school system's initial public placement and will not consent to that placement for "stay put" purposes?

Because Congress did not define "then-current educational placement" within the Individuals With Disabilities Education Act, an answer to the above question may require this Court to define or clarify the term "then-current educational placement."

LIST OF PARTIES

The Petitioner is St. Anne Community Unit High School District No. 302. The Respondents are Norman and Mari Koster, appearing in their own right and as next of friends of their son, Casey. The Illinois Board of Education has been listed as a party to all underlying proceedings but did not participate in the proceedings before the United States District Court for the Northern District of Illinois or the United States Court of Appeals for the Seventh Circuit.

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The Defendant-Counter-Plaintiff-Petitioner, St. Anne Community High School District No. 302, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion is published at *Casey K. by Norman K. and Mari K. v. St. Anne Community High School District 302*, 400 F.3d 508 (7th Cir. 2005), and is reprinted in the Appendix at 1a-22a. The United States District Court for the Northern District of Illinois entered two unpublished decisions in this case which are reprinted in the Appendix at 23a-29a and 34a-38a. The opinion of the Illinois State Board of Education's ("ISBE") Independent Hearing Officer is unpublished and reprinted in the Appendix at 30a-34a.

STATEMENT OF JURISDICTION

The Seventh Circuit's decision presented for review was entered on March 8, 2005. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case arises under the Individuals With Disabilities Education Act ("IDEA" or "the Act"), 20 U.S.C. § 1400, *et seq.* Specifically at issue is Section 1415(j), otherwise known as IDEA's "stay-put" provision, which states:

> Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents agree otherwise, the child

> shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(j).

The United States Department of Education has issued regulations implementing IDEA. Specifically, 34 C.F.R. § 300.514 pertains to IDEA's "stay put" provision. It states:

> (a) Except as provided in § 300.526, during the pendency of any administrative or judicial proceeding regarding a complaint under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.
>
> (b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.
>
> (c) If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section.

34 C.F.R. § 300.514.

STATEMENT OF THE CASE

Pursuant to IDEA, Congress provides money to the states to "ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. § 1400(d)(1)(A). The money is then disbursed by the states to local public school districts to fund necessary special education programming. The particulars of a child's special education programming must be set forth in an Individualized Education Program ("IEP"), which is reviewed at least annually. *See* 20 U.S.C. §§ 1400(d)(1)(A) and 1414(d).

A child's IEP assesses his or her educational needs, identifies goals and objectives, specifies the special education and related services the child will receive and establishes the setting in which the education and services will be delivered. *See id.* IDEA calls for a collaborative process between parents and school officials in the development of the child's IEP and the determination of his or her educational placement. *See* 20 U.S.C. § 1414(d). The Act requires that states establish an administrative hearing process for resolution of parent and school district disagreements, guarantees certain procedural safeguards and provides for judicial review of administrative decisions. *See* 20 U.S.C. § 1415(a)-(i). The "stay put" provision at issue in this case provides that, during the pendency of administrative and judicial proceedings conducted in accordance with the Act, "the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed." 20 U.S.C. § 1415(j). IDEA does not define the term "then-current educational placement."

Casey K., the student in this case, was an eighth grade student enrolled in St. Anne Elementary School District No. 256 ("Elementary School") during the 2003-04 school year. At the Elementary School, Casey received special education services pursuant to IDEA. In the course of Casey's eighth grade year, his parents became disenchanted with the Elementary School's program and unilaterally placed him at Acacia Academy, a private day school in LaGrange, Illinois. Subsequently, his parents filed a due process hearing request with the ISBE, arguing that the Elementary School should be responsible for funding the Acacia placement. Although the Elementary School believed that it could appropriately educate Casey within the public school, it agreed to pay for approximately 10 weeks of Casey's year-long placement at Acacia to avoid the cost of litigation. A formal settlement agreement was signed by the Elementary School and Casey's parents in March 2004. The Agreement reiterated the Elementary School's position that it could provide Casey with a FAPE in the public school setting but obligated the Elementary School to pay for Casey to attend and be transported to Acacia until Casey turned 15 years old on May 12, 2004. At that time, Casey's education was to become the responsibility of the Petitioner, St. Anne Community High School District 302 (the "High School").[1] In St. Anne, Illinois, the Elementary and High School Districts are two separate legal entities.[2]

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1. In Illinois, once a disabled child turns 15 years of age, his education becomes the responsibility of the high school district, regardless of whether he graduates from eighth grade. *See* 105 Ill. Comp. Stat. 5/14-6.01 (2004).

2. Illinois law allows for the creation of three general types of school districts. Community unit school districts provide education

(Cont'd)

An interim IEP was drafted to carry out the terms of the settlement agreement. The IEP indicated that it was drafted "per the Agreement" and did not state that there was a consensus that Acacia was the appropriate educational placement for Casey.

Recognizing its impending obligations to Casey, the High School scheduled an IEP meeting for May 12, 2004, but re-scheduled the meeting to May 17, 2004, upon the request of Casey's parents. The purpose of the meeting was to develop an educational plan for Casey's summer school education and freshman year.[3] The High School determined, after reviewing

(Cont'd)
in grades kindergarten through twelve. 105 Ill. Comp. Stat. 5/11A-1 *et seq.* Elementary school districts provide education in grades kindergarten through eight, and high school districts provide education for grades nine through twelve. *See* 105 Ill. Comp. Stat. 5/7-2b (2004); 105 Ill. Comp. Stat. 5/12-9 (2004) *et seq.* In some communities, two or more elementary school districts may underlie a single high school district, with each elementary school "feeding" its graduates into that high school district. Furthermore, a single elementary school district may also underlie two or more high school districts and send graduates to each of those high school districts.

3. When a child receiving special education transfers to a new school district, Illinois law permits the new school district to either adopt the former school's IEP or develop a new IEP for the child if the new district does not think that the former school's IEP is appropriate. *See* Ill. Admin. Code tit. 23 § 226.50(h)(2)(c) (2004). Furthermore, H.R. 1350, passed by Congress on November 19, 2004, and effective July 1, 2005, amends Section 614 of IDEA by adding a section specific to transfer students. *See* H.R. 1350, 108th Cong. (2004). The amended provisions of IDEA state that in cases where a child transfers to a new school district within the same state, the new school must provide the student with services "comparable" to those provided pursuant to the former school's IEP until such time as the new district develops its own

(Cont'd)

Casey's previous IEPs and evaluations, that it had a program within the public school sufficient to meet Casey's needs. The High School then drafted a new IEP that utilized the same goals and objectives contained in his expired Elementary School IEP but provided the services within the public school setting in accordance with IDEA's mainstreaming requirements.[4] Unhappy with the High School's placement determination, Casey's parents filed a request for a due process hearing, claiming that he should remain at Acacia at the High School's expense.

Before determining whether the High School's program was appropriate to meet Casey's needs, an ISBE Independent Hearing Officer considered whether Acacia constituted Casey's "then-current educational placement" for purposes of IDEA's "stay put" provision pending the resolution of the due process hearing. On July 20, 2004, the Hearing Officer ordered the High School to privately place Casey at Acacia pending the outcome of the due process hearing. The High School then filed a Motion for Injunctive Relief with the United States District Court for the Northern District of Illinois (the "district court") to enjoin the enforcement of the Hearing Officer's order. On August 13, 2004, the district court denied the High School's motion and ordered the High School to fund Casey's private placement at Acacia, including transportation, as his "stay put" placement, pending

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(Cont'd)
IEP or formally adopts the former school's IEP. A student transferring from an out-of-state school district must be provided services "comparable" to those in the former IEP until such time as the new district can conduct a new evaluation of the child and implement a new IEP. *See id.*

4. Section 1412 (4) of IDEA requires that to "the maximum extent appropriate, children with disabilities . . . [be] educated with children who are not disabled. . . ." 20 U.S.C. § 1412(a)(4).

the hearing officer's determination on the merits of the underlying due process hearing. In so holding, the district court determined that Casey's transfer to a new school system was irrelevant to the "stay put" analysis. Instead, the district court found that Acacia was Casey's "stay put" placement because it was the "operative placement under which Casey was receiving instruction at the time the dispute arose." *See Casey K. v. St. Anne Comm. High Sch. Dist. No. 302*, 2004 WL 3246973 *3 (N.D. Ill. 2004).

On appeal, the majority opinion for the Seventh Circuit also found Casey's transfer to a new school system to be irrelevant to the "stay put" determination. In fact, the court stated that to allow students' transfer status to be considered in determining their "stay put" placements would allow states to "crawl out from under [IDEA's] requirements ... by multiplying the number of [their] school districts." *Casey K.*, 400 F.3d at 512. In addition, the court completely disregarded the High School's argument that Casey's settlement-obtained placement could not constitute his "then-current educational placement" because it violated IDEA's mainstreaming mandates and the Act's unilateral placement prohibition.[5]

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5. The IDEA specifically provides that school districts are not required to pay for the education of a child enrolled in private school by his parents without the consent or referral of the local public school district:

> This subchapter does not require a [local school district] to pay for the cost of education ... of a child with a disability at a private school or facility if that [school district] made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

20 U.S.C. § 1412(a)(10(C)(I); *see also supra* text accompanying note 4.

Judge Sykes dissented from the majority opinion. She relied upon the Seventh Circuit's previously adopted "contextual approach"[6] to determine Casey's "stay put" placement and reached the opposite conclusion. In doing so, she noted that the majority "sidestep[ed] a determination of Casey's 'then-current educational placement' and overlook[ed] certain core requirements of the IDEA. . . ." *Casey K*, 400 F.3d at 515. Judge Sykes also indicated her agreement with the Ninth Circuit that a student's transfer status is relevant to the "stay put" determination under IDEA. *See id.*

REASONS FOR GRANTING THE PETITION

The main issue posed by this Petition is straightforward — what constitutes the "then-current educational placement" of a disabled child who is transferring into a new public school system when the student's parents challenge the new school system's initial placement and will not consent to that placement for "stay put" purposes. Because IDEA does not define "then-current educational placement," however, the resolution of this issue is not so straightforward.

While this Court has never before considered the issue posed by this Petition, it has indicated that the purpose of IDEA's "stay put" provision is to "prevent school officials from removing a child from the regular public school

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6. Although the majority did not indicate what standard it used to reach its determination, the Seventh Circuit has previously applied a contextual approach, defining a child's "then-current educational placement" as falling "somewhere between the physical school attended by a child and the abstract goals of a child's IEP." *See Bd. of Educ. of Cmty. High Sch. Dist. No. 218*, 103 F.3d 545, 548-49 (7th Cir. 1996).

classroom over the parent's objection pending completion of the review proceedings." *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 373, 105 S. Ct. 1996 (1985); *see also Honig v. Doe*, 484 U.S. 305, 323, 108 S. Ct. 592 (1988) (stating that the "stay put" provision was intended to strip schools of the unilateral authority they had traditionally employed to exclude disabled students from public schools).

Although this case arises out of circumstances the Seventh Circuit described as "novel," it can hardly be seen as such. There are currently approximately 15,000[7] separate public school systems in this country. Like Illinois, many states have "districted" their public school systems to create smaller, community based elementary schools, several of which "feed" into larger high school districts. Upon completion of a certain grade level or obtaining a certain age, a student "graduates" from the "feeder school" and applies for enrollment in the high school. Even in states that do not have this type of districting, public schools frequently accept for initial enrollment students transferring from other school districts for reasons other than matriculation.[8]

Arguably, this is the reason Congress included in IDEA the second clause of the "stay put" provision, which states, "if applying for initial admission to a public school, [the child] shall, with the consent of the parents, be placed in the

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7. Approximately 90,000 schools comprise these districts. *See* Lee McGraw Hoffman, *Overview of Public Elementary and Secondary Schools and Districts: School Year 2001-02*, NAT'L CTR. EDUC. STAT. 411 (2003).

8. In the High School's argument before the Seventh Circuit, it provided the example of a student whose parents are transferred from Illinois to another state for business.

public school program until such proceedings have been completed." 20 U.S.C. § 1415(j). However, because Congress was silent as to what happens when parents refuse to consent to the public school program, the door is open for parents to use the "stay put" provision to make an end run around IDEA's mainstreaming requirements and unilateral placement prohibition. The Seventh Circuit's opinion in this case, if permitted to stand, draws a roadmap for parents seeking to pursue such tactics.

Writ should be granted in this case because the lower courts are divided on an issue of federal law. Specifically, several United States Courts of Appeals have devised their own definitions of "then-current educational placement," alternatively defining it very narrowly or very broadly depending on the circumstances. *See Johnson v. Special Education Hearing Office*, 287 F.3d 1176, 1180 (9th Cir. 2002) (defining "stay put" as "typically the placement described in the child's most recently implemented IEP"); *Drinker v. Colonial Sch. Dist.* 78 F.3d 859, 867 (3d Cir. 1996) (stating that "stay put" is the "operative placement actually functioning at the time ... when the 'stay put' provision of the IDEA was invoked"); *Thomas v. Cincinnati Bd. Of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) (describing "stay put" as the placement at the time of "the previously implemented IEP"); *Hale ex rel. Hale v. Poplar Bluffs R-I Sch. Dist.*, 280 F.3d 831, 834 (8th Cir. 2002) (noting, "[a] transfer to a different school building for ... reasons unrelated to the disabled child has generally not been deemed a change in [educational] placement. . . ."); *A.W. v. Fairfax County School Bd.*, 372 F.3d 674, 682 (4th Cir. 2004) (indicating that the goals of the "stay put" provision are met when "a new [educational] setting replicates the educational program contemplated by the student's original assignment and is consistent with the principals of 'mainstreaming'. . . ").

Prior to this case, the Seventh Circuit had adopted what it has referred to as a "contextual approach" in which a child's "stay put" placement was defined as "fall[ing] somewhere between the physical school attended by a child and the abstract goals of a child's IEP." *Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Ill. State Bd. Of Educ.*, 103 F.3d 545, 548-49 (7th Cir. 1996). This approach has been described by its inventors as an "inexact science." *See id*. The many different definitions devised by the courts have resulted in inconsistent "stay put" determinations from jurisdiction to jurisdiction, and, in relation to the case at hand, conflicting rulings from the Seventh and Ninth Circuits regarding "stay put" placements for transfer students. This fact alone makes this petition worthy of certiorari. *See* Sup. Ct. Rule 10(a).

In addition, writ should be granted because the issue presented by this case is an important one. "Stay put" placement determinations, particularly those which require public funding of private school placements, not only impact the rights of this country's approximately six million disabled students in grades kindergarten through twelve[9], but impose significant financial burdens upon public school districts. This is especially true given the fact that the courts have left open the possibility that school districts will be required to fund private school "stay put" placements even though a hearing officer subsequently determines that the child was never entitled to the private placement. *See St. Tammany Parish Sch. Bd. v. Louisiana*, 142 F.3d 776, 788-89 (5th Cir. 1998) (deferring until after a decision on the merits concerning the child's placement whether the Louisiana Department of Education could recover "some, if not all, of the stay-put costs"); *Susquenita Sch. Dist. v. Raelee S.*, 96

9. *See* James Ansley, *Creating Accessible Schools*, NAT'L CLEARINGHOUSE EDUC. FACILITIES (2002).

F.3d 78, 87 n.10 (3d Cir. 1996) (noting that the district court concluded the school district could not seek reimbursement of "stay-put" costs even if it prevailed in the case, but declining to resolve the issue as premature). *But see Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 917-918 (1st Dist. 1983) (holding that "when parents are incorrect in their claim that an IEP provides an inappropriate education for their child, they, like any other parents, should bear the financial burden of giving their child a private education."). In this case, the Hearing Officer found the High School's proposed public school placement to be appropriate in a decision on the merits issued on October 19, 2004. However, because Casey's parents appealed that decision to the district court on January 8, 2005, the High School remains responsible for funding his private school placement.

Finally, this Petition presents an ideal vehicle for the creation of a more consistent standard for determining a child's "then-current educational placement" upon his or her initial enrollment in a public school (when the parents do not consent to the public school placement). Despite IDEA's stated purpose of preventing the unilateral exclusion of disabled students from public school, its "stay put" provision was manipulated here to require public funding of a student's private school education before it was determined that such private school was necessary to meet the student's needs. By allowing such manipulation, the Seventh Circuit ignored the clear language of Section 1415(j) of IDEA, which makes a student's transfer status relevant to "stay put" determinations when a student transfers out of one public school district and applies for initial enrollment in another. *See* 20 U.S.C. § 1415(j).

I. The Circuits Are Split on an Issue of Federal Law

The "stay put" provision has been described as an injunction meant to preserve the status quo during due process hearings. *See Monticello Sch. Dist. No. 25 v. George L.*, 102 F.3d 895, 905 (7th Cir. 1996). The purpose of the statutory injunction is to prevent deviation from an educational program arrived at through the IEP process while challenges to proposed changes in that program are addressed. *See id.*

The Ninth Circuit recently held that when responsibility for a child's special education shifts and a student transfers from one school system to another, the "*status quo* necessarily changes" and the newly responsible school system is not required to give a student exactly what he was receiving under his previous IEP to comply with IDEA's "stay put" provisions. *See Johnson*, 287 F.3d at 1181-2. Rather, that court held that a newly responsible legal entity is only obligated to provide a "comparable educational placement" and that a comparable placement qualifies as the "then-current educational placement" for "stay put" purposes. *Id.*

More specifically, in *Johnson*, the Ninth Circuit examined the special education placement of an autistic three-year old transitioning between a preschool and elementary school program. *See id.* at 1178. Prior to the student's third birthday, he received 35 hours a week of individualized therapy and 10 hours a week of supervision from the Central Valley Regional Center pursuant to an Individualized Family Service Plan (IFSP).[10] The Center contracted with a private company for those services. *See id.* at 1178.

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10. An IFSP is the equivalent of an IEP for children under three years of age.

As in this case, the child's education became the responsibility of a new school district (the Clovis Unified School District) on his third birthday. Like the High School here, Clovis proposed an IEP containing the same goals and objectives found in the child's IFSP, but utilizing different individuals and facilities to provide his services. The parents filed a request for a due process hearing and subsequently sought district court review of the hearing officer's decision that Clovis' IEP should be the "stay put" placement. *See id.* The district and appellate courts rejected the parents' argument that under IDEA's "stay put" provision Clovis was required to give the child exactly what he received under his IFSP, including the same vendors and supervisors used by the Regional Center. *See id.* at 1181-1182. In doing so, the Ninth Circuit concurred with the state hearing officer who noted, "the new agency need not, and probably could not provide the exact same educational program [for the child]." *Id.* at 1181-1182. In sum, the Ninth Circuit held that Clovis' implementation of the student's IEP goals in its public facility was sufficient to fulfill its "stay put" obligations under IDEA. *See id.*

The Seventh Circuit, seemingly in disagreement with the way Illinois chooses to operate its public school systems, opined that a student's transfer from one district to another should have no impact on his or her "stay put" placement. *Casey K.*, 400 F.3d at 512. In fact, the Seventh Circuit reasoned that such consideration would allow states to "crawl out from under [IDEA's] requirements . . . by multiplying [their] number of school districts." *See id.*

This reasoning not only conflicts with the Ninth Circuit's holding in *Johnson* but appears to conflict with this Court's previous statements that the "stay put" provision was intended

to strip schools of the unilateral authority they had traditionally employed to exclude disabled students from public schools. *Honig*, 484 U.S. at 323; *see also Sch. Comm.*, 471 U.S. at 373 (indicating that the "stay put" provision exists to "prevent school officials from removing a child from the regular public school classroom over the parent's objection pending completion of the review proceedings"). Congress reiterated this purpose by requiring that a disabled child's "stay put" placement, "if applying for initial admission to a public school, shall, with the consent of the parents, be . . . the public school program until all proceedings are complete." *See* 20 U.S.C. § 1415(j). Against this backdrop, it is clear that the consideration of a student's transfer status is more likely to guarantee a student's rights under IDEA than to e them away.

II. The Seventh Circuit's Interpretation and Application of the "Stay Put" Provision Conflicts With the Core Requirements of IDEA

IDEA seeks to provide all children with disabilities a "free appropriate public education and related services to meet their unique needs in the least restrictive environment." 20 U.S.C. § 1400(d). Under IDEA, parents, teachers and other school staff collaborate to design IEPs for disabled students. 20 U.S.C. § 1414(d). The IEP sets forth a disabled student's current levels of performance, goals and objectives for future performance, services to be provided to the student and the setting in which those services shall be delivered. *See id.* IDEA also contains procedural safeguards which include the right to a due process hearing before a state appointed independent hearing officer when a dispute arises regarding a student's IEP. *See* 20 U.S.C. § 1415. The "stay put" provision is included within these procedural safeguards. *See* 20 U.S.C. § 1415(j).

IDEA also contains a "mainstreaming" presumption, requiring that disabled children be educated in the least restrictive environment and in school with nondisabled students "[t]o the maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A); *see also Honig*, 484 U.S. at 311; *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202-03, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). It provides that "removal of children with disabilities from the regular educational environment [should occur] only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.* The IEP team's placement decision must be consistent with this "least restrictive environment" ("LRE") requirement and must ensure that "the child is educated in the school that he or she would attend if nondisabled" unless the child's educational program "requires some other arrangement." 34 C.F.R. § 300.552(a)(2), (c).

In this case, Casey's placement at Acacia was not the product of these determinations. Casey's private school placement was the Elementary School's attempt to appease litigious parents while riding out the last weeks of their enrollment responsibilities. All the while, the Elementary School maintained it could provide Casey with a FAPE in the least restrictive environment.

Of course, under IDEA, parents may reject an IEP and/or its designated educational placement and enroll their child in whatever private school they wish. However, IDEA also states that local school districts are not required to pay for the education of a child enrolled in private school by his parents without the school district's consent or referral. *See* 20 U.S.C. § 1412(a)(10)(C)(I) (stating that a local school district is not required "to pay for the cost of education . . . of a child with a disability at a private school or facility if that agency

made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility."). Instead, IDEA permits parents to be reimbursed where they have unilaterally placed their child in private school only after a "court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to [the unilateral private school] enrollment." 20 U.S.C. § 1412(a)(10)(C)(ii); *see also Clovis Unif. Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 641 (9th Cir. 1990). Because such a determination was not made in this case, Casey's parents' private school placement cannot constitute his "then-current educational placement" for "stay put" purposes.

Certainly, Congress could not have intended for IDEA's "stay put" provision to allow parents an end run around the Act's LRE provisions by requiring a public school to fund a unilateral private school placement where the student has only just enrolled in the public school and no hearing officer or judge has determined that the school failed to make a FAPE available. *See Brookline School Comm.*, 722 F.2d at 916 (stating, "the mainstreaming policy is frustrated if parents are able to defeat any effort to transfer their child into an adequate and appropriate public school placement [if] merely by appealing an adverse administrative decision . . . parents can obtain the exact relief requested—maintenance of a publicly-funded private placement . . ."). However, the Seventh Circuit's opinion allows parents to "crawl from under" IDEA's requirements by filing a request for a due process hearing in order to object to a school district's program before the school has the opportunity to serve the student in a public setting. This sets a dangerous precedent that can only be avoided by this Court's clarification of the term "then-current educational placement" and its application to transfer students.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED MARCH 8, 2005

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-3195

CASEY K. by NORMAN K. and MARI K.,

Plaintiffs/Counterdefendants-Appellees,

v.

ST. ANNE COMMUNITY HIGH SCHOOL DISTRICT NO. 302,

Defendant/Counterplaintiff-Appellant.

Appeal from the United States District Court
for the Central District of Illinois
No. 04 C 2128—**Joe Billy McDade**, *Judge*

ARGUED DECEMBER 8, 2004—DECIDED MARCH 8, 2005

Before FLAUM, Chief Judge, and POSNER and SYKES, *Circuit Judges.*

POSNER, Circuit Judge. This appeal by an Illinois school district presents a novel issue concerning the scope of the "stay put" provision of the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(j). The Act requires states such as Illinois that accept federal funding for the education

of disabled children to provide them with a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A); see *id.*, § 1412(a); 34 C.F.R. § 104.33(a); *Alex R. ex rel. Beth R. v. Forrestville Valley Community Unit School Dist. # 221*, 375 F.3d 603, 611 (7th Cir.2004); *Missouri Dept. of Elementary & Secondary Education v. Springfield R-12 School Dist.*, 358 F.3d 992, 998-99 (8th Cir.2004). The particulars of the child's program are required to be set forth in an "Individualized Education Program" devised by school officials in collaboration with the child's parents. 20 U.S.C. § 1414(d). Hearing officers resolve disputes regarding the IEP or its implementation. § 1415(f).

Casey K. was a student in the eighth grade of the St. Anne Elementary School, a public school in St. Anne, Illinois. He was and is severely dyslexic. His parents thought that the school could not provide him with the educational services to which the IDEA entitled him, and after enrolling him in a "therapeutic" private school, the Acacia Academy, sought a hearing pursuant to the IDEA to prove their contention and make the school district pay for the cost of the private school. The parties settled their dispute on March 4, 2004, agreeing that Casey could remain in the Acacia Academy at the expense of the school district until May 12, at which time, under Illinois law, having reached the age of 15 he would become the responsibility of the St. Anne Community High School District No. 302. 105 ILCS 5/14-6.01; *Board of Education of Community Unit School Dist. No. 428 v. Board of Education*, 680 N.E.2d 450, 452

(Ill.App.1997). For although the elementary school and the high school are only three blocks apart, they are each their own, separate school districts (the elementary school is the St. Anne Elementary School District No. 256), and thus each is a distinct "legal entity," with its own school board. 105 ILCS 5/10-10; see *Mueller ex rel. Math v. Community Consolidated School Dist. 54*, 678 N.E.2d 660, 665 (Ill.App.1997); *Board of Education v. Regional Board of School Trustees*, 460 N.E.2d 100, 105 (Ill.App.1984); *People ex rel. Smail v. Board of Education*, 99 N.E.2d 385, 387-88 (Ill.App.1951).

Under the settlement agreement, the IEP that the elementary school district had devised for Casey was to expire when he became the responsibility of the high school district. May 12, Casey's fifteenth birthday, arrived, and a few days later the high school district issued an IEP for him, as it was authorized by state law to do because it was a different district from the district of the school from which he was transferring. 23 Ill. Admin. Code § 226.50(h)(1). The new IEP did not authorize Casey's continued enrollment in the Acacia Academy at the school district's expense. The parents challenged this determination and sought a hearing, as they had before, at which they demanded that until the challenge was resolved, Casey must be allowed to remain in the Acacia Academy at the high school district's expense, pursuant to the stay-put provision. That provision states that while proceedings to enforce rights under the Act are pending, "the child shall remain in [his or her] then-current educational placement" at the expense of whatever public entity issued the IEP that is being challenged. 20 U.S.C. § 1415(j); 105 ILCS 5/14- 8.02a(*l*); *Beth B. v. Van Clay*, 282 F.3d 493,

496 (7th Cir.2002); *Mackey ex rel. Thomas M. v. Board of Education*, 386 F.3d 158, 160-61 (2d Cir.2004); *AW ex rel. Wilson v. Fairfax County School Board*, 372 F.3d 674, 679 (4th Cir.2004), which in this case is the high school district.

It is an open question whether, even if the parents lose their challenge, they must reimburse the public entity for the expense of the private-school placement to which the child, it turns out, was not entitled. *St. Tammany Parish School Board v. Louisiana*, 142 F.3d 776, 788-89 (5th Cir.1998). The Act doesn't say; doubtless the draftsmen had in mind that the stay-put provision would be invoked to keep the child in his current public school (the preferred placement, as we'll see) rather than in a private school, although there is no doubt that the state must pay for the private school if the state's own schools don't have a program to which the Act entitles a disabled child, and a private school does. 20 U.S.C. §§ 1412(a)(10)(B)(i), (C)(ii); *School Committee v. Department of Education*, 471 U.S. 359, 369-70 (1985); *Loren F. ex rel. Fisher v. Atlanta Independent School System*, 349 F.3d 1309, 1312 (11th Cir.2003). The argument for giving the parents a free ride is that otherwise they might be timid about trying to enforce their statutory right to a free private education in an appropriate case. The educational services required by the Individuals with Disabilities Education Act are often very costly—and when provided by a public school, far beyond the means of the average public school parent. The risk of an adverse decision by a hearing officer that would require reimbursement of the private school's charges would deter many parents from enrolling their child in a private school unless they were certain of their right to do so.

Appendix A

The stay-put provision has been interpreted as imposing an automatic statutory injunction, *Honig v. Doe*, 484 U.S. 305, 326-27 (1988); *Rodiriecus L. v. Waukegan School Dist. No. 60*, 90 F.3d 249, 253 (7th Cir.1996); *John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 556 (3d Cir.2003), like the automatic stay in bankruptcy. The effect of this interpretation is to make violation of the stay-put provision punishable by contempt, but it is also, as we shall see, to enable the district judge to exercise equitable discretion with respect to the duration of the stay. The district judge refused to lift the injunction (as we may call the stay), precipitating this appeal by the high school district. The district argues that if the automatic stay requires a school district other than the one responsible for the child's current placement to pay for the continuation of that placement while the parents are challenging the district's IEP, "receiving districts [will] be required to fund private school placements all over the state *and country* for as long as the parents continue [ ] challenging the placement decisions of the new school district" (emphasis added).

The district concedes that if both the elementary school and the high school were in the same school district, Casey would be entitled to "stay put" in Acacia Academy, the placement designated in the elementary school's IEP for him. Otherwise eighth graders wouldn't enjoy the protection of the stay-put provision at all, or tenth graders in a junior high school that ends in tenth grade even if, when they left elementary school for junior high school, or junior high school for (senior) high school, they remained in the same building. It's not as if the break between eighth and ninth grade, or between tenth and eleventh grade, is so much sharper than any other grade break as to make temporary continuation of the previous educational placement inappropriate.

Appendix A

We cannot see what difference it makes if a state decides that the elementary school and the high school serving the same pool of kids shall be deemed to constitute separate school districts. Whatever motivates such decisions (probably they are relics of a time when kids were required to attend school only through the eighth grade) has nothing to do with the purpose behind the stay-put provision. We are told that Illinois once had 950 school districts; were it to reinstate that number, the effects on the stay-put provision would be profound. We cannot see why such a decision should affect the rights created by a federal statute, or why Congress would have countenanced a state's diminishing those rights simply by designating every public school a separate school district. IDEA is a program of financial assistance to *states* conditioned on the *states'* complying with certain requirements of the Act, such as paying for the private education of disabled children in some instances. From the Act's standpoint the state is an indivisible unit. It must not be allowed to crawl out from under the Act's requirements—while retaining the federal money that it gets in exchange for submitting itself to those requirements—by multiplying the number of its school districts. It would make no sense if, simply by dividing all its school districts in half and thus doubling their number, a state could reduce the expense to it of compliance with the conditions in IDEA without surrendering a penny of IDEA funds.

It is entirely understandable that the St. Anne high school should not want to fund the elementary school's settlement with Casey's parents, which is, in effect, what the stay-put provision is compelling it to do. The settlement was attractive to the elementary school because it required the school to

pay for only nine weeks of Casey's stay at the Acacia Academy. It is arguable that before Casey should be allowed to remain in a private school at public expense, either the high school or a hearing officer should decide whether the public school can provide adequate services to the child. Expense is not the only issue; placing a child in a school for disabled children runs counter to the policy of the IDEA of "mainstreaming" disabled children to the "maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A); see *Honig v. Doe*, *supra*, 484 U.S. at 311; *Board of Education v. Rowley*, 458 U.S. 176, 202-03 (1982). The "removal of children with disabilities from the regular educational environment occurs *only* when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.* (emphasis added). The placement decision must be made in conformity with this statutory "least restrictive environment" requirement and must ensure that "the child is educated in the school that he or she would attend if nondisabled" unless the child's educational program "requires some other arrangement." 34 C.F.R. § 300.552(a)(2), (c). Sometimes it does require that; but it can be argued that the step was taken too lightly here in what amounted to a litigation settlement between an elementary school that would shortly have no further responsibility for the child and the child's parents.

That, however, is an issue for another day; it is not argued by the high school district. The district does complain about the settlement, but only because it was not a party to it. It does not argue that a settlement agreement cannot create a current educational placement; quite the contrary, it assumes that the settlement agreement created a valid placement for Casey in the Acacia Academy so long as he was under the

jurisdiction of the elementary school district. The high school district's *entire* legal argument for reversal, so far as we can discern, pivots on the fact that the state has placed the elementary school and the high school in separate districts. If they constituted a single district, the high school would be a party to the settlement agreement.

We add that as far as expense (as distinct from what is best for the child) is concerned, nothing compels the State of Illinois to allow the elementary school to shift the cost of Casey's continued stay at the Academy to the high school district. The state can allocate financial responsibilities among school districts as it pleases, so far as the IDEA is concerned. Each state has plenary authority over its public schools and can make appropriate arrangements for cost sharing across district lines if a child transfers to another district and his parents challenge the new district's Individual Educational Placement. There is no collision between state and federal interests.

The question presented by the state's curious districting is novel, as we said, and the only previous case the parties or we have been able to find that might seem to bear directly on it is *Johnson ex rel. Johnson v. Special Education Hearing Office*, 287 F.3d 1176 (9th Cir.2002) (per curiam). The school district reads the *Johnson* opinion hopefully to mean that when a child moves across district lines the stay-put provision no longer requires that the child receive exactly the services he was previously getting. For the court in *Johnson* said that a disabled child is only entitled to a "comparable educational placement." But the "comparable" placement in that case involved the identical curriculum and the identical tutors and

thus, as the court emphasized, was functionally identical to the child's prior placement, while the allegedly "comparable" placement that our district proposes would take Casey out of his private school and into a public school with completely different teachers, curriculum, and classmates. It was thus only in the most technical sense that by allowing the new district to call the tune the court in *Johnson* was dissolving the automatic injunction—and the court certainly nowhere said or suggested that it thought the injunction had *automatically* lapsed just because the child had left the district. See also *Ms. S. ex rel. G. v. Vashon Island School Dist.*, 337 F.3d 1115, 1133-34 (9th Cir.2003). There is some questionable language in *Johnson* that could be read to suggest that the automatic injunction isn't really automatic—it is— though what is true is that the automatic injunction can be dissolved for a compelling reason. *Id.* at 1180; see also *Honig v. Doe*, *supra*, 484 U.S. at 325-28; *Board of Education of Oak Park & River Forest High School Dist. 200 v. Illinois State Board of Education*, 79 F.3d 654, 660 (7th Cir.1996); *Light v. Parkway C-2 School Dist.*, 41 F.3d 1223, 1227-28 (8th Cir.1994). But the fact that the old school and the new, though only blocks apart, are separated by a district line is not a good reason, let alone a compelling one, and no other has been offered.

The district warns us that if we affirm, Casey's parents will be able to move him to Alaska and force the public school district in which they settle to pay for Casey's continued enrollment in the Acacia Academy while they challenge whatever IEP the Alaska district devises for the child. There is no way in which Alaska could limit the largesse of an Illinois elementary school, which might agree to a very

generous settlement indeed if it thought the child about to move to another state. But here is where the courts' treatment of the stay-put provision as an injunction has bite. If the schools were in different states (perhaps even if they were in different areas of the same state, though that we needn't try to decide), and if as a result the refusal to lift the automatic injunction would impose an unreasonable burden on the transferee school, the district court could exercise its equitable discretion to modify or dissolve the injunction. That is not the case here.

AFFIRMED.

SYKES, Circuit Judge, dissenting. I respectfully dissent. Acacia Academy was not Casey K.'s "then-current educational placement" for purposes of the "stay-put" provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(j).

As the court notes, the IDEA requires states that accept federal funding for the education of disabled children to provide them with a "free appropriate public education," the specific components of which are established in the child's Individualized Education Program (IEP), which is reevaluated at least annually. 20 U.S.C. §§ 1400(d)(1)(A) and 1414(d). A child's IEP assesses his educational needs, identifies achievement goals, and specifies the special education and related services to be provided in furtherance of those goals. *Id.* The Act calls for a collaborative process between parents, teachers, and special education administrators in the development of a disabled child's IEP and the determination of his educational placement. 20 U.S.C. § 1414(d). The Act requires states to establish an impartial administrative hearing process for the resolution of parental complaints, guarantees certain minimum procedural safeguards, and provides for judicial review. 20 U.S.C. § 1415(a)-(i). The so-called "stay-put" provision, at issue here, provides that during the pendency of administrative and judicial proceedings conducted pursuant to the Act, "the child shall remain in the then-current educational placement of such child." 20 U.S.C. § 1415(j).

The IDEA does not define the term "educational placement." As a general matter, "'educational placement,' as used in the IDEA, means educational program—not the

particular institution where that program is implemented." *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir.2003). The IDEA's implementing regulations require that the "placement decision" be made by a "group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options." 34 C.F.R. § 300.552(a)(1). The child's placement "is based upon the child's IEP," 34 C.F.R. § 300.552(b)(2), and the "IEP Team" must consider the unique strengths and needs of the child and the options available for his education. 20 U.S.C. §§ 1414(d)(1)(A), (B); 20 U.S.C. §§ 1414(d)(2), (3).

This circuit has adopted a contextual approach to determining a child's educational placement for purposes of the stay-put obligation. *Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Ill. State Bd. of Educ.*, 103 F.3d 545, 548- 49 (7th Cir.1996). We said in *Illinois State Board of Education* that the meaning of the term "educational placement" in the Act's stay-put provision "falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP." *Id.* at 548. Determining the scope of stay-put in individual cases is "something of an inexact science," one that depends upon the context and facts of each case, considered against the purposes of the IDEA. *Id.* at 548-49.

For example, we noted in *Illinois State Board of Education* that in expulsion cases a child's "educational placement" generally means his school, so that "a change of school is interpreted as a change in placement." *Id.* at 549. In the expulsion context, interpreting "educational placement" to mean the child's school of attendance "is in

keeping with [the] original purpose of the Education of the Handicapped Act: Congress passed the act to prohibit schools from excluding from the classroom difficult disabled students." *Id.* (citing *Honig v. Doe*, 484 U.S. 305, 309-10 (1988)). On the other hand, "[w]here fiscal concerns cause a student to be transferred, the courts focus not on the school, but on the child's general educational program. This looser interpretation of placement is appropriate because the concern is not whether the school is attempting to rid itself of a disabled child or that a disabled student has been placed in an inappropriate school." *Id.*

The court's analysis in this case sidesteps a determination of Casey's "then-current educational placement" and overlooks certain core requirements of the IDEA and some important facts underlying Casey's present attendance at Acacia. Educating disabled children outside of public school is strongly disfavored under the IDEA; the Act contains a "mainstreaming" presumption, requiring that disabled children be educated in the least restrictive environment and in school with nondisabled students "[t]o the maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A); *see also Honig*, 484 U.S. at 311, 108 S.Ct. 592; *Board of Education v. Rowley*, 458 U.S. 176, 202-03 (1982). The Act provides that "removal of children with disabilities from the regular educational environment occurs *only* when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.* (Emphasis added). The IEP Team's placement decision must be made in conformity with this statutory "least restrictive environment" requirement and must ensure that "the child is

educated in the school that he or she would attend if nondisabled" unless the child's educational program "requires some other arrangement." 34 C.F.R. §§ 300.552(a)(2), (c).

Of course, parents are free to reject an IEP and the educational placement offered by their local educational agency (LEA) and enroll their child in the private school of their choice, as Casey's parents did here. But this is at the parents' own expense—at least initially. The IDEA specifically provides that local educational agencies are *not* required to pay for the education of a child enrolled in private school by his parents without the consent of or referral by the LEA: "This subchapter does not require a local educational agency to pay for the cost of education ... of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and *the parents elected to place the child in such private school or facility.*" 20 U.S.C. § 1412(a)(10)(C)(I) (Emphasis added). The Act provides for the possibility of *reimbursement* for a unilateral parental private school placement, but only if a "court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to [the unilateral private school] enrollment." 20 U.S.C. § 1412(a)(10)(C)(ii). A school district obviously has no stay-put obligation under § 1415(j) to pay for the unilateral parental private school placement until the reimbursement claim is decided in the parents' favor.

Together, these provisions in the IDEA and its implementing regulations operate to establish this predicate

for a *private school* "educational placement": there must first be a determination that the LEA either cannot or has not fulfilled its obligation to provide a free appropriate public education to the disabled child in the public school. This determination is made by the LEA itself, through the IEP process (in which case it makes the private school placement), or by a hearing officer or a court, where the LEA and the parents disagree about the appropriateness of the placement proposed by the IEP Team. A unilateral private school placement by a child's parents does *not* become the child's "then-current educational placement" for purposes of stay-put unless and until the LEA acknowledges that mainstreaming in the public school is inappropriate or a hearing officer or court determines that the LEA has failed to timely provide a free appropriate public education.[1]

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1. Thus, the court's reference to "giving the parents a free ride" because "otherwise they might be timid about trying to enforce their statutory right to a free private education" some-what overstates the matter. *See supra* p. 9. There is no generalized right to a free *private* education under the IDEA. The IDEA guarantees a "free appropriate *public* education"; parents who unilaterally enroll their child in private school have a right to reimbursement of private school costs *if* a hearing officer or court determines that the LEA failed to provide a "free appropriate public education." There is no "free ride" in this situation because the school district has no obligation to pay on a reimbursement claim until it has been adjudicated in the parents' favor. It is a separate question whether parents can be required to "reimburse" a school district that pays on a private school reimbursement claim that has been adjudicated against it by a hearing officer but is later overturned—perhaps not, for the reasons stated by the court. *Id.* But this does not mean that parents have a right to have their unilateral private school decision recognized as a stay-put

(Cont'd)

Neither of these things has occurred here. The administrative process initiated by Casey's parents after they enrolled him at Acacia was aborted by the March 4, 2004, settlement agreement between the parents and the elementary district. As the court notes, because Casey would soon turn fifteen and become the responsibility of the high school district, the elementary district made a prudential litigation decision: it agreed to pay Casey's tuition and transportation costs at Acacia from February 19, 2004, to May 12, 2004, his fifteenth birthday, when responsibility for his education would transfer to the St. Anne Community High School District.

Importantly, however, the elementary district continued to maintain that it could provide a free appropriate public education to Casey at St. Anne Grade School pursuant to the IEP that his parents had rejected—in other words, that Casey could be successfully "mainstreamed." The settlement agreement restated the district's position in this regard and contained the standard nonadmission of any liability or violation of federal or state law. The agreement called for an

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(Cont'd)

placement (triggering the school district's obligation to pay) *before* its appropriateness has been adjudicated by a hearing officer. There is no such private school "free ride" under the IDEA. Moreover, the right to private school reimbursement, once adjudicated, does not go on indefinitely, but only while the school district is noncompliant (or acknowledges its inability to comply) with its obligation to provide a "free appropriate public education." *See Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 371-74 (1985); *Monticello Sch. Dist. No. 25 v. George L.*, 102 F.3d 895, 905-06 (7th Cir.1996).

interim IEP to be developed for Casey at Acacia for purposes of carrying out the terms of the settlement and to comply with the IDEA for the short duration of the agreement but did not purport to effectuate a private "educational placement" for Casey at Acacia. An IEP meeting was convened on March 25; the IEP document reflects that the purpose of the meeting was limited to the "settlement agreement" and establishes an IEP termination date of May 12, 2004, "per agreement between Parents & District." The section of the IEP that would ordinarily contain the IEP team's evaluation of the least restrictive environment for the child's education—which requires an explanation of the team's consideration and rejection of all public school "mainstreaming" options before private school placement is considered—is left blank, except for a notation that placement at Acacia was "as per agreement."

Accordingly, the settlement agreement and the limited term IEP developed in its aftermath did not amount to a private school educational placement under the IDEA for purposes of triggering the stay-put obligation. No hearing officer or court has determined that the elementary district failed to timely provide Casey with a free appropriate public education before Casey's parents enrolled him at Acacia or that private school was appropriate. *See* 20 U.S.C. § 1421(a)(10)(C)(ii). Pursuant to the settlement agreement, Casey's parents withdrew their administrative reimbursement claim against the elementary district; it was never adjudicated on its merits. Nor has the LEA determined that because of the nature and severity of Casey's disability, a free appropriate public education cannot be satisfactorily provided in the regular public school environment. *See* 20 U.S.C. § 1412(a)(5)(A).

Appendix A

The short-term IEP put in place pursuant to the settlement agreement was hardly the result of a bona fide IEP process of the deliberative sort contemplated by the statute and regulations. It was a financial expedient, not a reasoned educational placement decision. There was never any consideration of available placement options or the least restrictive environment for Casey's education; that Casey would be schooled at Acacia was a foregone conclusion given his parents' unilateral decision to place him there. The elementary district consistently maintained that it was willing and able to provide Casey with a free appropriate public education and never conceded that the private school was appropriate as a least restrictive educational placement. *See Mayo v. Balt. City Pub. Schs.*, 40 F.Supp.2d 331, 334 (D.Md.1999) ("BCPS agreed to pay Thurston's tuition but did not agree that it was unable to provide a free, appropriate public education to Thurston or that Norbel [a private school] was an appropriate placement for Thurston.").

Thus, Casey's attendance at Acacia remains as it was: a unilateral decision by parents to send their child to private school. It cannot be invoked by Casey's parents as his "then-current educational placement" for purposes of the high school district's stay-put obligation in connection with the present dispute. The elementary district's temporary and conditional acquiescence in the parents' unilateral action cannot constitute an "educational placement" for purposes of the stay-put requirement. The statutory injunction prevents deviation from an educational program arrived at through the intricate and deliberative IEP process while parental challenges to proposed changes in that program are worked out. Here, however, it is the child's parents who altered the

status quo: Casey's parents rejected his eighth grade IEP, withdrew him from the public school, enrolled him in private school, and are now seeking to have their unilateral action recognized as an "educational placement" for purposes of the stay-put obligation in connection with their dispute with the high school district. This turns stay-put on its head. *See Monticello Sch. Dist. No. 25 v. George L.*, 102 F.3d 895, 905 (7th Cir.1996) ("The 'stay put' provision is meant to preserve the status quo during such due process hearings. However, the parents' analysis of that provision would reverse that concept and create a new, permanent 'stay put' for a unilateral [private school] placement.").

The temporary IEP now invoked by Casey's parents for purposes of the stay-put obligation was put in place not by a collaborative educational evaluation but pursuant to a limited financial settlement. "Payment and placement are two different matters." *Zvi D. v. Ambach*, 694 F.2d 904, 908 (2d Cir.1982). It is unclear to me why such a stop-gap financial compromise should be considered an "educational placement" at all, much less the child's "then-current educational placement" for purposes of stay-put; the agreement and the interim IEP expired on May 12, 2004. The court's application of the stay-put requirement to this unilateral parental private school enrollment conflicts with the IDEA's explicit preference for mainstreaming, its elaborate IEP process, and its proviso that private school costs need not be reimbursed until certain factual predicates are either admitted or proven to the satisfaction of a hearing officer or a court.

Appendix A

Other courts have held that a unilateral parental private school placement becomes a child's "then-current educational placement" for purposes of the stay-put requirement only *after* there has been an administrative determination that the private school placement is appropriate. *See Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 641 (9th Cir.1990); *Zvi D.*, 694 F.2d at 906-07; *see also Mayo*, 40 F.Supp.2d at 333-34; *Saleh v. District of Columbia*, 660 F.Supp. 212, 215 (D.D.C.1987). I agree with the decisions of these courts.

It is true that in its argument before this court, the high school district focused primarily on the legal effect of Casey's transfer from the elementary school district to the separate high school district. However, the school district did assert (albeit as a secondary argument and less completely than I have explained here) that Acacia cannot be considered Casey's "then-current educational placement" for purposes of stay-put because it was a unilateral parental private school placement, because it violated the IDEA's "mainstreaming" requirements, and because it was a short-term settlement expedient and not the product of an IEP process that determined its appropriateness. Accordingly, I cannot agree with the court that the school district failed to argue this issue.[2]

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2. I acknowledge the inconsistency in the high school district's argument, which is noted by the court: the district asserted that Acacia is not Casey's "then-current educational placement" under what it called "traditional stay-put analysis," but also suggested that the elementary school district would have been required to finance Casey's continued education at Acacia under stay-put had Casey remained under the elementary district's jurisdiction.

Appendix A

Regarding the legal effect of the interdistrict transfer, I agree with the reasoning of *Johnson v. Special Education Hearing Office*, 287 F.3d 1176, 1181-82 (9th Cir.2002), that a transfer of responsibility from one distinct educational agency to another has relevance for stay-put analysis.[3] Illinois

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3. At issue in *Johnson v. Special Education Hearing Office*, 287 F.3d 1176 (9th Cir.2002) was the application of the stay-put provision where responsibility for a disabled child's education shifted from one educational agency to another because of the child's age. *Johnson* involved a preschool child who, while under the age of three, received special education services pursuant to a program established and implemented by a regional public educational agency. *Id.* at 1178. When the child turned three, the responsibility for his education transferred from the regional agency to the local school district; the local district developed an IEP that used the same goals, objectives, and services as the child's previous program with most, but not all, the same service providers (the child's tutors were the same, but the local district substituted its own supervisors). *Id.* at 1179-82. The child's parents were dissatisfied and initiated a due process hearing; they also filed a stay-put request with the administrative hearing office asserting entitlement to *exactly* the same service providers as under the regional agency's educational program. The administrative hearing office adopted the local school district's interpretation of the stay-put obligation in this situation and issued a stay-put order requiring the district to implement the regional agency's program except that the district "need not utilize the same vendors who provided services under that [program]." *Id.*

The parents filed for injunctive relief in district court. The district court denied relief and the Ninth Circuit affirmed. *Id.* The court noted that when responsibility for a child's education shifts from one educational agency to another, "the status quo necessarily changes." *Id.* at 1181. The court held that where a disabled child "transitions

(Cont'd)

has promulgated regulations governing interdistrict transfers, which generally require the receiving district to implement the former district's IEP until it develops one of its own. *See* 23 Ill. Adm.Code 226.50(h). However, for the more fundamental reasons discussed above, I conclude that Acacia is not Casey's "then-current educational placement" for purposes of the stay-put obligation under § 1415(j).

(Cont'd)

between educational agencies," the transferee district "can meet the requirements of the 'stay-put' provision by providing [a] comparable educational placement." *Id.* at 1181. The hearing office's stay-put order was consistent with the statute because it "maintained the stability of [the child's] educational program as contemplated by the 'stay-put' provision, while taking into account the reality of a shift in responsible educational agencies." *Id.* at 1182. Because the educational program developed by the local school district was comparable to that which had been provided by the regional agency (only the plan supervisors were different), "the 'stay-put' order correctly determined [the child's] 'then current educational placement'" for purposes of § 1415(j). *Id.* at 1182.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS DATED AND FILED AUGUST 13, 2004

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 04-2128

CASEY K. by NORMAN and MARI K.,
Individually and as his Parents and Next Friends,

Plaintiff,

v.

ST. ANNE COMMUNITY H.S. District No. 302 and
ILLINOIS STATE BOARD OF EDUCATION

Defendant.

ORDER

Previously, Plaintiff Casey K. (Casey) sought a temporary restraining order requesting, among other things, a stay-put order placing him at Acacia Academy (Acacia), the private school he was attending on May 12, 2004, -- the day Defendant St. Anne Community High School (St. Anne) became responsible for his education. The Court denied Casey's request but remanded the case back to the Independent Hearing Officer (IHO) for further proceedings to determine the appropriate stay-put placement for Casey. On remand, the IHO decided that Acacia was Casey's stay-put placement. Defendant St. Anne Community High School

(St. Anne) now seeks a temporary restraining order and injunctive relief from the IHO's decision (Doc. #6), and Casey has also renewed his motion seeking, among other things, an order enforcing the IHO's decision (Doc. #10).

On March 4, 2004, Casey's parents and the elementary school responsible for Casey's education reached a settlement agreement by which the elementary school agreed to pay for Casey to attend Acacia from February 19, 2004, until it was "no longer legally and financially responsible" for Casey's education. Per the agreement, Acacia was to convene an Individual Education Plan meeting "to develop an appropriate [IEP] for [Casey] at Acacia"; and Casey's parents and the elementary school were required to ask that a representative from St. Anne attend the IEP meeting. (*Id.* at Ex. 1.) As relevant, the subsequently developed IEP of March 25, 2004, (the "elementary IEP") contained notations that the purpose of the meeting was a "settlement agreement," that the projected end date was May 12, 2004, "Per Agreement between Parents & District," and that the IEP was for "IEP year" 2003-04. However, many of the goals in the IEP had initiation dates beyond the May 12 end date and contrary to the settlement agreement, the IEP provided for extended school year services. The elementary IEP indicated that Casey's placement was to be in a "therapeutic day school - [a]s per agreement." (*Id.* at Ex. 2.) On May 12, 2004, Casey turned 15 years old and St. Anne became legally and financially responsible for his education. St. Anne convened an IEP meeting on May 17 to develop a new IEP for Casey; the new IEP provided for an in-district placement for Casey. It is this IEP that Casey's parents are challenging in the underlying due process proceedings.

Appendix B

The stay-put provisions of the Individuals with Disabilities Education Act (IDEA) provides that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child. . . ." 20 U.S.C. § 1415(j) (emphasis added). As perceived by the administrative hearing officer, the determining issue in this case is what constitutes Casey's "current educational placement." (Doc. 8 at Ex. 4.)

St. Anne contends that Casey's placement at Acacia did not have the imprimatur of the IDEA since it was not the result of an administrative determination of the "appropriate educational placement" for Casey, but merely a private agreement between Casey's parents and the elementary school district which expired "by its own provisions" on May 12, 2004. However, settlement agreements are not unusual in IDEA disputes and indeed the statute appears to contemplate agreements between the parties as it requires them to participate collaboratively in the development of an IEP. *See* 20 U.S.C. § 1414(d).

St. Anne also argues that the elementary IEP could not bind it because it was not involved in the development of that IEP, and it was not a party to the settlement agreement. It further argues that as a newly responsible legal entity, it was not obligated to provide Casey a stay-put placement in his elementary placement. In support, St. Anne relies on the Illinois Special Education regulation regarding transfer students and the Ninth Circuit case of *Johnson v. Special Education Hearing Officer*, 287 F.3d 1176 (9th 2002).

Appendix B

Section 226.50(h)(1) of the Illinois State Board of Education regulations states:

> If a child who is receiving special education from a local school district transfers to another district, the new district is responsible for ensuring FAPE by providing special education and related services in conformity with an IEP. When a transfer student is presented for enrollment, the district shall enroll and initiate educational services to the student immediately. The new school district shall ensure that the child has an IEP in effect.
>
> . . . .
>
> C) The district may develop a new IEP for the child if the school district or the parents do not believe the current IEP is appropriate. In such a case, the district shall, within ten days after the date of the child's enrollment, initiate an IEP meeting for the purpose of developing the new IEP. While the new IEP is under development, the district shall implement the IEP from the former district.

23 Ill. Admin. Code § 226.50(h)(1). St. Anne argues that this regulation allows a receiving district to use its own judgment to determine what the appropriate placement is upon a student's enrollment in the new district and that this new placement becomes the "then current placement" for purposes of the stay-put provision. The court disagrees. This section

merely recognizes the procedural safeguards necessary to change a transfer student's IEP; it does not prescribe what should happen if the parents object to the newly developed IEP or what the stay-put placement should be in such a situation. Further, the fact that this section requires the new school district to implement the old school district's IEP while the new one is being developed undermines St. Anne's argument that it cannot be forced to implement an IEP developed by another school district.

In *Johnson v. Special Education Hearing Officer*, 287 F.3d 1176 (9th 2002), the Ninth Circuit found that an autistic child transitioning from an "Individual Family Service Plan" program (a program for children under 3 which focused on the developmental needs of the child and the requirements of the child's family) to an IEP educational program was entitled to an educational placement in conformity with his previous placement, but that he was not entitled to have the same suppliers for those educational services. In reaching its decision, the *Johnson* court analogized the child's transition to that of a transfer student under California law. The court recognized that under California law a transfer student could be placed in an interim educational placement "in conformity" with an IEP for a period not to exceed 30 days. *Id.* at 1181-82.

The Court finds that *Johnson* is distinguishable from the present case for several reasons. First, the child in *Johnson* was transitioning from a family focused program implemented under Part C of the IDEA (early intervention program) to a program under Part B of the IDEA (IEP program). *See* 20 U.S.C. §§ 1411-1419, 1433-1445. There is

no such transition here as Casey's educational program was and still is governed by Part B of the IDEA. Second, the transfer provisions under Illinois law differ from the California regulations relied upon by the *Johnson* court in that the Illinois regulations require a new district to "implement the IEP from the former district" and make no mention of an interim placement. *See* 23 Ill. Admin. Code § 226.50(h)(1). Finally, the child in *Johnson* was receiving in-home services before and after his transition and thus no change in the location of the educational services was necessary when the supplier of the services changed.

In conclusion, because St. Anne has provided no other authority to support its assertion that a transferring student's stay-put placement should be determined without regard to the placement implemented by the previous school district, the Court finds that the IHO correctly determined that Acacia was Casey's stay-put placement. *See Thomas v. Cincinnati Bd. Of Educ.*, 918 F.2d 618, 625-26 (6th Cir. 1990) (current educational placement within meaning of IDEA's stay-put provision is operative placement under which child is actually receiving instruction at time dispute arises). Accordingly, St. Anne's temporary restraining order motion is denied.

The Court believes that this decision will moot many of, if not all of, the points raised in Casey's current motion for a temporary restraining order. Accordingly, Casey is directed to resubmit his motion if additional relief is necessary.

Appendix B

IT IS THEREFORE ORDERED that St. Anne Community High School's Counter Claim for Injunction and Temporary Restraining Order (Doc. # 6) is DENIED.

IT IS FURTHER ORDERED that Casey K.'s Renewed Motion for a Temporary Restraining Order (Doc. # 10) is DENIED as moot with leave to reinstate within fourteen (14) days.

ENTERED this 13th day of August, 2004.

s/ Joe B. McDade
JOE BILLY McDADE
Chief United States District Judge

APPENDIX C — RESPONSE TO MEMORANDA REGARDING STAY PUT OF THE ILLINOIS STATE BOARD OF EDUCATION IMPARTIAL DUE PROCESS HEARING ENTERED JULY 8, 2004

ILLINOIS STATE BOARD OF EDUCATION IMPARTIAL DUE PROCESS HEARING

ISBE #4040

Marie A Bracki, Psy.D.
Impartial Hearing Officer

Casey Koster

and

St. Anne Community High School District 302

RESPONSE TO MEMORANDA REGARDING STAY PUT

The parents of the student filed a request for a due process hearing against the high school district on May 17, 2004 following an IEP conference. The high school sought to place the student in a program at the local high school for the coming school year and offered an ESY (extended school year) program for the student. The parents disagreed with the placement and want the student to continue his education at the Acacia Academy in La Grange, Illinois.

The previous IEP written by the elementary school district terminated on May 12, 2004. However, the student continued to attend the Acacia placement until the end of

the academic year. There was a problem with the transportation arrangements for the last three days of the year. The high school district indicated its willingness to transport the student in the morning but not in the afternoon and requested that the parents transport the student home. The parents requested that the hearing officer order the transportation for the return trip and make the placement the student's Stay Put Placement. This request was denied based on a significant lack of information regarding the particulars of the case. The parents then went to Federal Court to seek a Temporary Restraining Order to establish the student's Stay Put Placement at Acacia. Judge Joe Billy McDade denied the TRO and remanded the proceedings before the assigned hearing officer.

The new IEP developed on May 17, 2004 extends to May 2005. Further, the student continued to attend Acacia until the end of the school year with transportation fully provided by the high school district until the last three days of the school year. The district advised the parents that the bus would be returning the student at mid-day based on other scheduling requirements.

The parent and the district have submitted Motions and Responses regarding what should be decided as the Stay Put Placement of the student.

Both the IDEA at 300.514 and the lllinois Administrative Code at 226.650 are instructive on the Stay Put provision during the pendency of a due process hearing. The child is to remain in his or her current educational placement unless the State or local agency and the parents of the child agree

otherwise. What is in question in this case is what constitutes the student's "current educational placement."

The parents argue and assert that the Acacia Placement is the only valid "current" educational placement. The district contends that its proposed IEP and placement constitute the "current" educational placement.

The district submitted a case from the Ninth Circuit Court to consider in this determination. In this case a young autistic child was moving from an IFSP (Individualized Family Service Plan) to a different legal entity, the school district, on his third birthday. In this case the district argued that the new agency (school district) need not, and probably couldn't provide the same program The district contended that the status quo changes and the new responsible legal entity is not required to give a student exactly what he was previously receiving.

The parents argue that the high school's proposed IEP is irrelevant since it contains the placement challenged in the underlying administrative proceeding. In Murphy v. Arlington Cent. Sch. Dist. Bd. Of Educ., 102 LRP14390 (2nd Cir. 1992), the court made reference to an earlier 2d Circuit decision, Board of Educ. of the Pawling Cent. Sch. Dist. v. Schultz, 36 IDELR 261(2nd Cir.2002) stating "the court rejected the district's argument that the development of a new IEP cancelled the stay-put provision for the year encompassed by the program. It said such an interpretation of the IDEA 'would undermine entirely the pendency placement provisions of the IDEA, allowing a school district to avoid (stay-put) by the mere proposal of anew IEP.'" A similar

teaching comes from Spilsbury v. District of Columbia, 40 IDELR259 (D.D.C. 2004). The court explained that the "district erroneously argued the proposed placement was the current placement because its IEP's were developed before the school year began." Further noted is the fact that the court stated that the private school placement was the current educational placement. "To hold otherwise would require the students to 'stayput' at the district's proposed placement, thus, allowing it to make the unilateral change prohibited by the IDEA."

The parents cite an Illinois case which based its decision on a 6th Circuit Court case, Thomas v. Cincinnati Bd. Of Educ., 918 F2nd 618 (6th Cir. 1990) establishing the stay pay placement as being where the ... "the child is actually receiving instruction at the time the dispute arises."

Based on the foregoing discussion, the following Order is issued:

> The Stay-Put Placement for the student should be Acacia, including full transportation and related services, until a final Order is rendered and judicial proceedings have been completed.

This Order dated the 20th of July 2004.

Marie A. Bracki, Psy.D.
Impartial Due Process Hearing Officer

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS ENTERED JULY 8, 2004

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case No. 04-2128

CASEY K. by NORMAN and MARI K., Individually and as his Parents and Next Friends,

Plaintiff,

v.

ST. ANNE COMMUNITY H.S. District No. 302 and ILLINOIS STATE BOARD OF EDUCATION

Defendant.

ORDER

Before the Court is Plaintiff's Motion for a Temporary Restraining Order and Automatic Statutory Injunction for Stay Put [Doc. # 3]. For the reasons that follow, Plaintiff's motion will be denied at this time, however, this case is remanded to the Illinois State Board of Education (ISBE) for further proceedings.

Appendix D

DISCUSSION

Judicial review is generally not available under the Individuals with Disabilities education Act (IDEA) unless all administrative procedures' have been exhausted. *See Honig v. Doe*, 484 U.S. 305, 326-27(1988). However, a party may bypass the administrative process if they can demonstrate that the process *would be futile* or inadequate. *See id.*

In this case, the record reflects that on June 1, 2004, St. Anne Community High School's (SACHS's) attorney faxed a letter to Plaintiffs attorney indicating SACH's would only be providing limited transportation for Casey K. (Casey) on June 2-4, the last 3 days of Acacia Academy's (Acacia's) school year. That same day, Plaintiff's attorney requested that an Independent Hearing Officer (IHO) issue an emergency order "for Stay Put to include full, needed transportation through graduation in a few days." On June 2, the IHO denied the request for transportation finding "the high school has no responsibility and was not a party to the IEP that terminated on May 12, 2004."

On May 17, 2004, SACHS prepared a new IEP for Casey for the 2004-2005 school year and 2004 summer school (ESY) providing for an in-District placement which presumably has been challenged by Casey's parents and therefore remains only an intended placement (not an actual placement). Except for the June 2 request, there is no indication that Casey's parents have requested a "stay put" order from the IHO as to this proposed change in placement. Plaintiff now requests an injunction against Defendants

(1) requiring them to pay for all tuition, fees, related services, and transportation arising from Casey's placement at Acacia from May 12 through June 6, 2004, and (2) requiring them to pay for one-on-one tutoring by Acacia for every hour Casey has missed of Extended School Year (ESY) services. Plaintiff also request that the Court find Defendants violated Casey's procedural rights under 20 U.S.C. § 1415 and that the Court order Defendants to pay costs and attorney's fees. In the alternative, Plaintiff requests that the Court remand this case back to the IHO for resolution in the underlying administrative proceeding with instructions as to the applicable law.

The Court finds that judicial review of Plaintiff's complaint is unavailable at this time. Plaintiff has not exhausted her administrative remedies nor has she shown that exhaustion would be futile or that administrative remedies are inadequate. The only evidence of exhaustion is the IHO's June 2 letter denying Casey's request for transportation. There is no evidence that Casey has ever requested from the IHO the relief she now asks for in this Court. Considering the speed with which the IHO responded to Casey's initial request for a "Stay-Put" order; it appears this issue could be resolved expeditiously through administrative procedures, thus avoiding any irreparable harm to Casey. *Cf. Murphy v. Arlington Central School District*, 297 F.3d 195, 199 (2d Cir. 2002) (finding administrative process was inadequate to remedy violations of IDEA's stay put provision because of time sensitive nature of provision).

While the Court will leave for another day any finding as to the correctness of the IH0's previous ruling, the Court believes Casey is entitled to some type of prospective "Stay-Put" relief while her underlying administrative claim is pending. *See* 105 ILCS 5/14-8.02a(j) (during pendency of any administrative or judicial proceeding, unless school district and parents or guardian of student otherwise agree, student shall remain in his or her present educational placement); *Thomas v. Cincinnati Board of Education*, 918 F.2d 618, 625-26 (6th Cir. 1990) (stay put placement does not refer to unimplemented IEP, rather placement is the "operative placement under which the child is actually receiving instruction at the time the dispute arises"). However, because the record is unclear as to whether the IHO considered and decided this issue (as opposed to the limited transportation issue presented to it) the Court remands this case back to the IHO to determine the appropriate "Stay-Put" placement for Casey.

CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff's Motion for a Temporary Restraining Order and Automatic Statutory Injunction for Stay Put [Doc. # 3] is DENIED at this time with leave to renew after post-mandate action by the IHO.

This case is remanded to the Illinois State Board of Education for further proceedings before the assigned independent hearing officer.

Appendix D

ENTERED this 8th day of July, 2004.

Joe Billy McDade
JOE BILLY McDADE
Chief United States District Judge